Supreme Court, U.S.
FILED

No. (1) 01 861 DEC 3 2001

OFFICE OF THE CLERK

In The Supreme Court of the United States

VIOLET MMBONE ASHIHUNDU,

Petitioner,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE
and
JOHN ASHCROFT, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

David L. Cleveland, Esq.
Counsel of Record
CATHOLIC CHARITIES IMMIGRATION
924 G Street NW, #225
Washington, DC 20001
[202] 772-4345

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400t • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether It Violates The Due Process Guarantee Of The Fifth Amendment Of The U.S. Constitution To Deport A Mother For Failing To Appear At Just One Hearing, Because The Government's Legitimate Interests Can Be Accomplished By A Lesser Sanction.

2. Whether It Is Manifestly Unjust To Deport A Child's Mother For Failing To Attend Just One Hearing.

LIST OF PARENT COMPANIES

The petitioner is neither a corporation nor a subsidiary of a corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARENT COMPANIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. The Facts 2

B. The Decisions Below 3

REASONS FOR GRANTING THE WRIT 4

A. The Court below failed to address whether the Due Process Clause forbids the Government to deport a mother for failing to appear at just one hearing, because the Government's legitimate interests can be accomplished by a lesser sanction 4

B. The Court below failed to determine that it is manifestly unjust to deport a child's mother for failing to attend just one hearing 5

Where There Is No Real Prejudice To The Government, Rules Must Be Construed To Achieve Justice 6

The Punishment Must Be Proportionate To The Crime 7

CONCLUSION 11

APPENDIX-

TABLE OF AUTHORITIES

Page(s)

Cases:

Degen v. United States,
517 U.S. 820 (1996) 9, 10

Henderson v. Norris,
258 F.3d 706 (8th Cir. 2001) 9

Pioneer Investment Services v. Brunswick Associated,
507 U.S. 380 (1993) 7

Solem v. Helm,
463 U.S. 277 (1983) 8, 9

Stutson v. United States,
516 U.S. 193 (1996) 6

Trop v. Dulles,
356 U.S. 86 (1958) 10, 11

United States v. Bajakajian,
524 U.S. 321 (1998) 7, 8

United States v. Halper,
490 U.S. 435 (1989) 10

Zadvydas v. Davis,
121 S.Ct. 2491 (2001) 4, 5

Statutes:

8 U.S.C. section 1158(a) 2

8 U.S.C. section 1229a(b)(5)(A) 1

8 U.S.C. section 1229a(b)(5)(C) 1

8 U.S.C. section 1229a(e) 2, 4

8 U.S.C. section 1229b(a) 2

8 U.S.C. section 1231(a)(6) 5

18 U.S.C. section 982(a)(1) 8

28 U.S.C. section 1254(1) 1

28 U.S.C. section 2106 6

OPINIONS AND ORDERS BELOW

The September 11, 2001 opinion of the U.S. Court of Appeals for the Fourth Circuit, Pet. App. 1, is unreported. The March 9, 2001 opinion of the Board of Immigration Appeals is also unreported. Pet. App. 4-6. The December 14, 1999 opinion of the Immigration Judge is unreported. Pet. App. 7-10.

BASIS FOR JURISDICTION

The Board of Immigration Appeals dismissed the Petitioner's appeal of an earlier immigration judge's decision on March 9, 2001. Petitioner then filed a Petition for Review in the U.S. Court of Appeals for the Fourth Circuit. That court denied the petition on September 11, 2001.

This Court has jurisdiction to review the Fourth Circuit's decision pursuant to 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. section 1229a(b)(5)(A) provides that an alien who, after being provided written notice of a proceeding, fails to appear at the proceeding, "shall be ordered removed in absentia..."

8 U.S.C. section 1229a(b)(5)(C) provides that the immigration judge may rescind the *in absentia* removal order "if the alien demonstrates that the failure to appear was because of exceptional circumstances..."

8 U.S.C. section 1229a(e) "exceptional circumstances" states:

> The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."

STATEMENT OF THE CASE

Ms. Ashihundu, the Petitioner, from the country of Kenya, failed to attend one hearing before the Immigration Judge. That judge imposed the sanction of deportation upon her. Ms. Ashihundu argues that this sanction is so harsh, disproportionate and excessive that it must be deemed unconstitutional.

A. The Facts

Ms. Ashihundu, a native and citizen of Kenya, entered the United States in 1985, on a one-year employment visa. Petitioner's Declaration, paragraph 1. She has since overstayed.

On February 12, 1993, she gave birth to a baby girl, Aileen, born in Hyattsville, Maryland. *Id.* paragraph 2. Aileen is now in third grade at Sligo Elementary School.

On April 20, 1993, Ms. Ashihundu filed an application for asylum, as per 8 U.S.C. section 1158(a).

She engaged the services of a lawyer named Jacob Owusu, to whom she paid $3,000. Pet. Declaration, Para. 6.

On March 8, 1999, Ms. Ashihundu, through her lawyer, filed an application for Cancellation of Removal, as per 8 U.S.C. section 1229b(a), asserting

"My removal would result in exceptional and extremely unusual hardship to my USC child."

These applications for relief were set for an Individual Hearing on June 21, 1999, before an Immigration Judge in Baltimore, MD.

Mr. Owusu then informed Ms. Ashihundu that he was traveling to Ghana, and that he might not be back for the June 21st hearing. In early June, 1999, Ms. Ashihundu talked to the adult children of Mr. Owusu, who told her they did not know when he would return. *Id.*. Para 7. Ms. Ashihundu was worried, but was reluctant to pay more money to another lawyer, and just hoped that Mr. Owusu would return.

She stated in her Declaration, at paragraph 9: "I was nervous and afraid...I didn't know where the court was. Mr. Owusu had driven me there before. I was afraid to go alone."

On June 21, 1999, neither Ms. Ashihundu nor her attorney appeared in court, and on that date, Ms. Ashihundu was ordered deported in absentia. A.R. 83.

In October 1999, Ms. Ashihundu filed a Motion to reopen, attaching a Declaration wherein she asserted that she did not appear in court because she was "paralyzed with indecision," because she was confused, and because she was afraid. A.R. 45.

She also stated at paragraph 12: "I have a six-year old daughter who will suffer exceptional and extremely unusual hardship if I am deported...."

B. The Decisions Below

The Immigration Judge, without mentioning the U.S. Constitution, determined that Ms. Ashihundu had not demonstrated "exceptional circumstances" for her non-attendance. The Board of Immigration Appeals affirmed, also without any mention of the U.S. Constitution.

The U.S. Court of Appeals for the Fourth Circuit affirmed, stating that the Board had "applied the correct standard in assessing Ashidundu's case." That Court also did not mention the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

A. The Court Below Failed To Address Whether The Due Process Clause Forbids The Government To Deport A Mother For Failing To Appear At Just One Hearing, Because The Government's Legitimate Interests Can Be Accomplished By A Lesser Sanction.

Ms. Ashihundu, a native and citizen of Kenya, filed two applications for relief before the Immigration Judge in Baltimore, MD: cancellation of removal and asylum. Her applications were set for a Merits hearing on June 21, 1999. On that day, Ashihundu did not attend because she was "nervous." This admittedly is not a good reason for failure to attend, nor is it an "exceptional circumstance" as defined by the literal words of 8 U.S.C. section 1229a(e).

Ms. Ashihundu deserves to be punished and sanctioned for her failure to appear; however, to construe the above-cited statute to require the sanction of deportation is unconstitutional.

The Government has not demonstrated that its interests could not be accomplished by a lesser sanction.

The statute in question here should be construed to avoid constitutional problems, as was the statute in *Zadvydas. v. Davis*, 121 S. Ct. 2491, 533 U.S. ___, (2001).

In *Zadvydas*, petitioner was born in Germany, and committed several crimes in the United States. After being convicted of attempted robbery, burglary, theft, and possessing cocaine, he was sentenced to 16

years' imprisonment. He was ordered deported to Germany, but that country would not accept him. The Attorney General then proposed to detain petitioner indefinitely, pursuant to 8 U.S.C. section 1231(a)(6).

The Supreme Court, however, noted that a statute "permitting indefinite detention of an alien would raise a serious constitutional question," perhaps violating the Fifth Amendment's Due Process Clause. *Id.* At 2498. That Clause forbids the Government to "deprive" any "person... of liberty...without due process of law." The court found that there was "no sufficiently special justification here for indefinite civil detention" articulated by the Government. *Id.* At 2499. The court noted that the Due Process Clause applies to all "persons" within the United States, "including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* At 2500.

Furthermore, aliens "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* At 2501. The court then ruled that the statute in question must be construed to contain an implicit "reasonable time" limitation, to avoid constitutional concerns.

The reasoning of *Zadvydas* should be applied to the case at bar: a statute which requires the sanction of deportation, for failing to attend just one hearing, must be construed to avoid serious constitutional concerns.

B. The Court Below Failed To Determine That It Is Manifestly Unjust To Deport A Child's Mother For Failing To Attend Just One Hearing.

Ms. Ashihundu is the sole support for her eight-year-old daughter. To deport this mother would no doubt teach her a lesson, but it would also impose an enormously painful sanction upon her child. The child

would either also be deported, or would live separate from her mother. This result is "unjust." In numerous other contexts, courts have deemed statutes and rules to be "unjust" and unenforceable, where the sanction imposed was unfair.

Where There Is No Real Prejudice To The Government, Rules Must Be Construed To Achieve Justice

In *Stutson v. United States*, 516 U.S. 193 (1996), Mr. Stutson was convicted and sentenced on a cocaine charge. His lawyer mailed a notice of appeal so that it arrived one day late for the 10-day deadline, and at the Court of Appeals, when it should have been sent to the District Court. The District Court and the Court of Appeals for the Eleventh Circuit denied Stutson all relief.

The Supreme Court, however, vacated and remanded those decisions, stating that Stutson's "liberty and due process rights" were important, and that "our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow technicalities that cause no prejudice to the prosecution to preclude a remand under 28 U.S.C. section 2106 (1988 ed.) 'in the interests of justice.'..." *Id.* at 194.

"But dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." (citations and quotations omitted) *Id.* at 197.

In *Stutson*, the Court granted relief to a man convicted on cocaine charges. In the case at bar, the future of a little girl is at stake.

For another example, see *Pioneer Investment Services v. Brunswick Associates Limited Partnerships*, 507 U.S. 380, 393 (1993), where the Bankruptcy Court set a deadline for creditors to file a proof of claim. Attorney for respondent filed a proof of claim some 20 days late, and argued this was permissible under a Bankruptcy Court rule which allowed late filings due to "excusable neglect." The attorney claimed his neglect was excusable because he was experiencing a "disruption" in his professional life. The lower court denied relief, stating that the late filing was not "due to circumstances which were beyond the control" of the lawyer. The lower court held that deadlines must be enforced, to achieve the goals of certainty and finality in litigation.

The Supreme Court, however, granted relief, stating that while it does not want parties to freely ignore court-ordered deadlines, it is also true that courts must be "equitable, and take into account all the circumstances," such as whether there any prejudice to the opposing party, and whether there was an impact on judicial proceedings.*Id.*

In *Pioneer*, an attorney for a creditor in bankruptcy court was granted relief. So too should Aileen's mother.

The Punishment Must Be Proportionate To The Crime.

Ms. Ashihundu is in contempt of court, and deserves some punishment. However, to deport her is to impose a disproportionately severe punishment.

In *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 2031, (1998), the case was summarized in the first paragraph of the decision:

> Respondent Hosep Bajakajian attempted to leave the United States without reporting, as required by federal law, that he was transporting more than $10,000 in currency. Federal law also provides that a person convicted of willfully violating this reporting requirement shall forfeit to the government "any property... involved in such offense." 18 U.S.C. section 982(a)(1). The question in this case is whether forfeiture of the entire $357,144 that respondent failed to declare would violate the excessive Fines Clause of the Eight Amendment. We hold that it would, because full forfeiture of respondent's currency would be grossly disproportionate to the gravity of his offense.

The Court also stated that the "amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 2036. If the forfeiture is "grossly disproportional to the gravity of a defendant's offense," it violates the Constitution. *Id.*

In *Bajakajian*, there was no fraud, and respondent "caused no loss to the public fisc." *Id.* at 2038.

In the present case, there is almost no loss to the public fisc. Deportation is grossly disproportionate a penalty.

In *Solem v. Helm*, 463 U.S. 277 (1983), defendant issued a bad check for $100. It was his seventh offense. The court held that the 8th Amendment proscribed life sentence without possibility of parole for this crime.

"The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Id.*at 283.

In *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001), defendant was sentenced to life imprisonment, pursuant to an Arkansas statute, for the delivery of .238 grams of cocaine base. The Court ruled that his sentence was cruel and unusual punishment under the Eight Amendment to the U.S. Constitution, finding that the punishment was "grossly disproportionate" to the crime. The Court considered the harm caused to the victim and to society, the culpability of defendant, whether there was violence or weapons involved, and the fact that defendant had no prior convictions. The Court also looked to other sentences imposed for other crimes. The Court concluded that the sentence imposed was "so harsh in comparison to the crime for which it was imposed that it is unconstitutional." *Id.* At 722.

In *Degen v. United States*, 517 U.S. 820 (1996), Mr. Degen was indicted for distributing marijuana. The Government also filed a civil forfeiture complaint against Degen, seeking $5.5 million worth of property. Degen fled to Switzerland to avoid the criminal prosecution, but filed an answer to the forfeiture case. The Government then argued that Degen was thereby "disentitled" to contest the civil case, because he fled.

The Court acknowledged that the dignity of the trial court was threatened, and that Degen was causing a waste of time and delay of the Government's objectives. However, the Court noted that a federal court has an array of means to enforce its orders. "The existence of these alternative means of protecting the Government's interests, however, shows the lack of

necessity for the harsh sanction of absolute disentitlement." *Id.* at 827. Yes, indignity has been visited upon the court, and the court wants to deter others; "but, disentitlement is too blunt an instrument for advancing [these interests of the Government]." *Id.*

In *United States v. Halper*, 490 U.S. 435 (1989), a Mr. Halper was the manager of a laboratory who submitted $585 of false claims to the Government. For this crime, he was sentenced to two years' imprisonment and a $5,000 fine. Then, the Government filed a civil suit seeking $130,000 for the same conduct. $130,000 was 220 times greater than the Government's measurable loss.

A unanimous Supreme Court held that Mr. Halper could not be subjected to the civil suit. The court held that the Double Jeopardy clause is offended when a "small-gauge offender" is subjected "to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

In *Trop v. Dulles*, 356 U.S. 86 (1958), a United States citizen named Trop deserted from the military in time of war, and was sentenced to three years at hard labor. At issue in the case was whether Trop should also suffer the sanction of loss of citizenship, pursuant to a statute. The Supreme Court held that such a statute violated the Eighth Amendment to the Constitution, because it was penal in nature and prescribes a "cruel and unusual" punishment.

The Court found that the penalty was "cruel in its excessiveness," and noted that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 125.

The Court also commented upon deportation, recognizing that this sanction had been earlier deemed as not a penalty. The Court stated that "deportation is

undoubtedly a harsh sanction that has a severe penal effect," and that the view that deportation is not a penalty "may be highly fictional." *Id.* at 121.

The Supreme Court has granted relief to negligent lawyers, to a man with $357,000 cash at an airport, to a bad-checkwriting felon, to a false claimant, to drug dealers, and to a deserter in time of war. So too should relief be granted to a child's mother who failed to attend just one hearing.

Ms. Ashihundu has committed an offense: she did not appear at her hearing. She is deserving of some sort of sanction or punishment. However, the sanction imposed must be in proportion to her offense. The sanction of deportation is grossly disproportionate to the gravity of her offense.

CONCLUSION

Ms. Ashihundu is in contempt of court, and deserves to be sanctioned. However, to construe the above-cited statute such that only the sanction of deportation can be imposed, is too severe. The statute must be construed to avoid injustice.

Respectfully submitted,

David L. Cleveland, Esq.
Counsel of Record
Catholic Charities Immigration
924 G St. NW, #225
Washington, DC 20001
[202] 772-4345

TABLE OF CONTENTS
Appendix to Petition

Page

Opinion,
United States Court of Appeals
for Fourth Circuit
entered September 11, 2001 ..... App. 1

Decision of
Board of Immigration Appeals
entered March 9, 2001 ..... App. 4

Decision of
Immigration Judge
entered December 14, 1999 ..... App. 7

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1434

VIOLET MMBONE ASHIHUNDU,
Petitioner,

versus

U.S. IMMIGRATION &
NATURALIZATION SERVICE;
JOHN ASHCROFT, Attorney General,
Respondents.

On Petition for Review of an Order
of the Board of Immigration Appeals.
(A-70-671-700)

Submitted: August 17, 2001
Decided: September 11, 2001
[Entered: September 11, 2001]

Before MOTZ, TRAXLER, and GREGORY,
Circuit Judges.

Petition denied by unpublished per curiam opinion.

David L. Cleveland, CATHOLIC CHARITIES IMMIGRATION, Washington, D.C., for Petitioner.

Stuart E. Schiffer, Acting Assistant Attorney General, Linda S. Wendtland, Assistant Director, Robbin K. Blaya, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Violet Mmbone Ashihundu, a native and citizen of Kenya, seeks review of an opinion and order of the Board of Immigration Appeals (Board) dismissing her appeal and affirming the decision of the immigration judge (IJ) denying a motion to reopen her deportation proceedings. The IJ ordered Ashihundu deported in absentia after she failed to appear for her deportation hearing. We review the order of the Board pursuant to 8 U.S.C.A. S 1229a(b)(5)(D); S 1252(b)(6)(West 1999). Our review of the record discloses that the IJ and the Board applied the correct standard in assessing Ashihundu's case, and the decision to deny the motion to reopen was not an abuse of discretion. Other arguments Ashihundu raises before the court are without merit. Accordingly, we deny the petition for review. We

dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

Decision of the Board of
Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Date: March 9, 2001
[Entered: March 9, 2001]

File: A70 671 700 - Baltimore

In re: VIOLET MMBONE ASHIHUNDU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
David Cleveland, Esq.

CHARGE:
Notice: **Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227 (a)(1)(B)] - In the United States in violation of law**

ORDER:

PER CURIAM. We have jurisdiction over this timely appeal from the Immigration Judge's December 14, 1999, decision denying the respondent's motion to reopen her case following a hearing held on June 21, 1999, in which the respondent was ordered removed in absentia. In her motion to reopen, the respondent stated that she did not appear at her hearing because

she was "paralyzed with indecision," confused and afraid as she had been unsuccessful in her efforts to contact the attorney she had retained. The Immigration Judge found that the respondent's excuse for failing to appear did not constitute exceptional circumstances within the meaning of the Act. The appeal is dismissed.

An order of removal issued following proceedings conducted in absentia pursuant to section 240(b)(5) of the Immigration and Nationality Act. 8 U.S.C. § 1229a(b)(5), may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because she did not receive proper notice of the time and place of the hearing, or because she was in federal or state custody and failed to appear through no fault of her own. *See Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995); *Matter of Gonzalez-Lopez*, 20 I&N Dec. 644 (BIA 1993). The respondent concedes that she received notice of the time and place of her hearing, but asserts that she failed to appear due to exceptional circumstances. "The term 'exceptional circumstances' refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." Section 240(e)(1) of the Act. We agree with the Immigration Judge's conclusion that the respondent's excuse for failing to appear for her hearing, i.e., anxiety as she had to appear without her attorney, does not rise to the level of exceptional circumstances as that term is defined in the Act. *See Sharma v. INS*, 89 F.3d 545, 547 (finding that the alien's traffic difficulties do not qualify as exceptional circumstances beyond the alien's

control). Moreover, we note that the record reflects that the respondent's attorney was personally served with notice of both the hearing, and the consequences for failing to appear. It is well established that notice served on the attorney of record constitutes notice to the alien. *See* 8 C.F.R. § 292.5(a). Because the respondent's attorney received the notice of hearing and the attendant consequences, we find no merit to the respondent's suggestion that she received legally inadequate notice. [1] As we find no error on the part of the Immigration Judge, the appeal is dismissed.

\s\ _____
For the Board

---

[1] Moreover, as noted, the concedes that she was well-aware of the scheduled hearing.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

In the Matter of:	*	**In Removal Proceedings**
Violet M. Ashihundu	*	
	*	**Case No: 70-671-700**
(RESPONDENT)	*	

CHARGE: Section 237(a)(1)(B) of the Immigration and Naturalization Act, overstay.

APPLICATION: Motion to Reopen Proceedings and to Rescind/Stay of Deportation

[Entered: December 14, 1999]

ON BEHALF OF RESPONDENT

David Cleveland, Esq.
Catholic Charities
Immigration Services
1221 Massachusetts Ave., NW
Washington, DC 20005

ON BEHALF OF THE INS

Linda Dominguez, Esq.
Assistant District
Counsel, INS
100 S. Charles St.
12th Floor
Baltimore, MD 21201

MEMORANDUM OF DECISION AND ORDER

Respondent through counsel has filed an "impassioned" motion to reopen her proceedings to set aside an "in absentia" order of removal and deportation. Respondent concedes that she was aware of her hearing date but did not appear because of exceptional circumstances. Those exceptional circumstances stated in the motion represent that the respondent was "paralyzed with indecision, because she was confused, and because she was afraid. Also, she has been abandoned by her former lawyer, to whom she paid $3,000."

Specifically, respondent's affidavit states:

> "In mid-June, 1999, I was nervous and afraid. I did not have a lawyer who would talk to me; I didn't know what to do, Should I go to Court alone? I didn't know where the Court was. Mr. Owusu had driven me there before. I was afraid to go alone. I feared the judge would get mad at me.
>
> On 6/21/99 I woke up: I was nervous, scared, and paralyzed with indecision. Would someone come and handcuff me? I was confused; I didn't know what to do. Going to Court without a lawyer would have been futile, because I didn't know what to say. I was seriously ill. My brain was not functioning"...

Respondent acknowledges her wrong doing by not attending her court hearing but avers she has meritorious applications for cancellation of removal as a non-permanent resident and asylum.

The Immigration and Naturalization Service (INS) opposes the motion and argues that the motion does not demonstrate "exceptional circumstances" as defined by INA, Section 240(e)(1).

The motion must be denied.

While this Court may be sympathetic to respondent, sympathy is not the test of eligibility to secure reopening. The Immigration Court is not a court of equity.

Respondent and counsel failed to appear for a merits hearing on June 21, 1999. As a result the court issued an "in absentia" order of removal and dismissed her applications for relief. See INA, Section 240(b)(5)(A). Respondent concedes she was aware of the hearing date but did not attend. Thus in order to secure reopening, she must establish "exceptional circumstances" for her non attendance.

The term "exceptional circumstances" is defined by statute, INA, §240(e)(1)

> "The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."

Respondent's failure to attend her hearing does not rise to the level of "exceptional circumstances" as contemplated by the statute. See In re Rivera-Carlos, Int Dec. 3296 (BIA 1997), (reopening denied based on unsuccessful communications with attorney); In re S-A, Int Dec. 3331 (BIA 1997), (reopening denied for heavy traffic deemed not exception circumstances); In re J-P-, Int Dec. 3348 (BIA 1998), (reopening denied for severe headache deemed not exceptional circumstances); In re B-A-S-, Int Dec. 3350 (BIA 1998), (foot injury without explanation for failing to contact court not deemed exceptional circumstances)

The motion is denied.

DONE and ORDERED this 14th day of June 1999.

\s\ _____
John F. Gossart, Jr.
U.S. Immigration Judge